

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ARNE SVERRE RODLEY,)
Petitioner,)
v.)
UNITED STATES OF AMERICA,)
Respondent.)

CASE NO. C05-1159MJP-MJB
(CR98-41MJP)
REPORT AND RECOMMENDATION

INTRODUCTION

Petitioner is a federal prisoner who is currently confined at the Federal Correctional Institution at Safford, Arizona. Petitioner has filed a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his federal court sentence. The government has filed a response in which it opposes petitioner's motion. Following a careful review of the record, this Court concludes that petitioner's § 2255 motion should be denied.

PROCEDURAL HISTORY

On April 3, 1998, petitioner was convicted, following a jury trial, on one count of armed bank robbery in violation of 18 U.S.C. § 2113(a) and (d) (Count I), one count of using and carrying a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)

1 (Count II), and one count of bank robbery in violation of 18 U.S.C. § 2113(a) (Count III).

2 (CR98-41MJP, Dkt. Nos. 106 and 109.)

3 Prior to petitioner's sentencing, the United States Probation Office ("USPO") prepared a
4 presentence report for the Court. (See Dkt. No. 7.) The USPO therein calculated a combined
5 adjusted offense level of 24 for the two bank robbery counts (Counts I and III), and a criminal
6 history category of one. (*Id.*, at 8-9.) In calculating petitioner's adjusted offense level, the USPO
7 began with the base offense level of 20, the base offense level applicable to robbery offenses under
8 § 2B3.1 of the United States Sentencing Guidelines. (*Id.*) Pursuant to § 2B3.1(b)(1), two levels
9 were then added to the base offense level because property of a financial institution was taken.
10 (*Id.*) Finally, two more levels were added, in accordance with § 3D1.4 of the United States
11 Sentencing Guidelines, because petitioner was convicted of multiple counts of robbery. (*Id.*)
12 This combined adjusted offense level of 24 resulted in a guideline range of 51 to 63 months for
13 the robbery offenses. (*Id.* at 14.) The firearms count (Count II) carried a mandatory 60 month
14 consecutive sentence. (*Id.*)

15 On September 28, 1998, petitioner appeared before the Honorable William L. Dwyer,
16 United States District Judge, for sentencing. (See CR98-41MJP, Dkt. No. 180.) Judge Dwyer
17 apparently adopted the guideline calculation of the USPO and sentenced petitioner to a term of 51
18 months for the bank robbery convictions, and to a consecutive term of 60 months for the firearms
19 conviction. (See *id.*, Dkt. Nos. 177, 178 and 180.)

20 Petitioner appealed his convictions to the Ninth Circuit Court of Appeals. *See United*
21 *States v. Rodley*, 215 F.3d 1335 (9th Cir. 2000). On March 30, 2000, the Ninth Circuit issued an
22 unpublished opinion affirming petitioner's convictions. *Id.* On June 24, 2005, petitioner filed the
23 instant motion for relief under § 2255. The government filed a timely response to petitioner's
24 motion on September 14, 2005, and petitioner filed a reply brief in support of his motion on
25 October 6, 2005.

DISCUSSION

2 Petitioner asserts in his § 2255 motion, and supporting memorandum, that his Sixth
3 Amendment right to confront witnesses against him was violated when records of the Federal
4 Deposit Insurance Corporation were admitted into evidence at his trial. Petitioner relies upon the
5 United States Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), to
6 support this claim. Petitioner also asserts that his Sixth Amendment right to trial by jury was
7 violated when he received upward adjustments to his offense level based upon facts which were
8 not submitted to a jury or proven beyond a reasonable doubt. Petitioner relies upon the United
9 States Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005), to support his
10 second claim.

11 In its response to petitioner’s § 2255 motion, the government argues that petitioner’s
12 *Crawford* claim is time-barred. The government further argues that petitioner’s *Booker* claim is
13 barred by *Teague v. Lane*, 489 U.S. 288 (1989), because the Supreme Court’s ruling in *Booker* is
14 not retroactive. Petitioner, in his reply brief, concedes that his *Crawford* claim is time-barred
15 because he failed to raise that claim within one year of the date that the *Crawford* decision was
16 issued by the United States Supreme Court. Petitioner argues, however, that the rule announced
17 by the Supreme Court in *Booker* is retroactive and that his *Booker* claim is therefore meritorious.

18 Given petitioner’s concession that his *Crawford* claim is time-barred, the Court need not
19 address that claim further. The Court therefore turns directly to petitioner’s claim that he is
20 entitled to relief under *Booker*.

21 Resolution of petitioner’s *Booker* claim turns on whether the Supreme Court’s decision in
22 *Booker* announced a new rule and, if so, whether that new rule applies retroactively to cases on
23 collateral review. The Supreme Court has been silent as to whether *Booker* applies retroactively.
24 However, the Ninth Circuit – and all other circuit courts that have considered the question – has
25 held that *Booker* did announce a new rule, that the rule does not meet any of the *Teague*
26 exceptions, and that the rule therefore does not operate retroactively. *See United States v. Cruz*,

1 423 F.3d 1119 (9th Cir. 2005). It is undisputed that petitioner's conviction became final prior to
2 the date *Booker* was decided. As the Ninth Circuit has now made clear that *Booker* does not
3 apply retroactively to cases on collateral review, petitioner's § 2255 motion must fail.

4 CONCLUSION

5 For the foregoing reasons, petitioner's motion under 28 U.S.C. § 2255 to vacate, set
6 aside, or correct his sentence, should be denied. A proposed order is attached to this Report and
7 Recommendation.

8 DATED this 9th day of January, 2006.

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12 MONICA J. BENTON
13 United States Magistrate Judge
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